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ABSTRACT

This document attempts to deal with certain legal issues which the author feels are basic to understanding the function of government in the professional licensing or certification of educators. It is the basic argument of this paper that the right and responsibility of the state to certify teachers is a legitimate, moral, and rational use of the political power of the state only to the extent that teacher certification protects and promotes some demonstrably legitimate public interest of the people for whose welfare and benefit State-accredited schools are established. The author limits his remarks to legal issues on teacher certification as found in New York State and in New York City. The author notes that in these areas and correspondingly in most of the United States constitutional and statutory law leaves broad discretionary authority to public agencies charged with the responsibility of certifying teachers and administrators. The paper proceeds to cover topics such as certification to protect students, parent role in teacher certification, protection of the rights of teachers and administrators, certification of school administrators as management or labor, job-relatedness of certification procedures, racial discrimination and certification procedures, and proposals to reform teacher preparation and certification policies in New York State.

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BASIC LEGAL ISSUES
IN
NEW YORK STATE ON TEACHER CERTIFICATION

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INTRODUCTION

No one suffering from an acute case of appendicitis would deliberately entrust the healing of his body to an unqualified physician. Similarly no parent seeking an education for his child, suited to the economic, political and social realities of today, would deliberately entrust the child to an unqualified teacher or school administrator. Yet as laymen, both a person suffering from a physical disease or a parent seeking an adequate education for a child are not capable by themselves of distinguishing accurately the competent doctor or educator from the medical or educational quack. Given the need in any well organized community for an adequate pool of qualified professional physicians and teachers, and given the inability of typical laymen to determine even the minimum level of real qualifications possessed by those people in a community who call themselves doctors or teachers, governmental agencies have been authorized by public law (constitutional, statutory, and administrative to examine and certify the basic minimum level of qualification acceptable in any person seeking to practise medicine or education.

This paper will attempt to deal with certain legal issues which I feel are basic to understanding the function of government in the professional licensing or certification of educators.

DEFINITIONS AND BASIC PREMISES

In order that the discussion to follow may be as intelligible as possible, it seems appropriate at the beginning to provide operational definitions of key concepts, terms and premises related to what I will describe as basic legal issues in the certifying of teachers and school administrators.

---Teachers and school administrators: Teachers are persons who help other people to learn; school administrators are primarily persons who help teachers to teach.

---Teacher certification: Teacher certification is a determination by public authorities of the possession by aspiring teachers and administrators of the most important qualities that effective teachers and school administrators should have, e.g. personal qualities, such as leadership, integrity, ability to communicate with others, commitment to children, and dedication to learning. Today's call for a more "human" education will depend upon the qualities of those who work with children.

The combination of qualities that make for a good teacher or administrator are complex and not uniform in all candidates. Some kinds of teachers perform well in some situations and not in others, under some learning styles and not under others, with some children and not with others, at one period of a child's life and not at another period, or with some aspects of a child's learning and not with others. The same is true of school administrators.

- Traditional teacher certification: Traditional certification policies and procedures consist of mechanical or mass-administered examinations of a candidate's academic preparation and experience. Such examinations cannot adequately evaluate the kinds of personal qualities most important for teaching and administering schools; even less do they have the sensitivity or flexibility for precise assignments for specific teaching and administrative needs.
- On-the-job performance evaluation: Examination and evaluation of a teacher's or administrator's performance on the job is the most reliable test of the competence of teachers and school administrators. Assessment of performance on the job must be fair and objective. It should not be left solely to the subjective judgments of an immediate supervisor or any one group. It should involve the observation and perspectives of teachers, supervisors, parents, students, and others.
- Role of teachers and parents in certification: Teachers and teacher organizations, and parents should play a greater role than they now do in setting and monitoring standards for professional competence of teachers and school administrators.
- Basic legal issue: A basic legal issue in certification is any question or problem relating to the certification of teachers and administrators which is so fundamental that the various laws and regulations governing teacher and/or administrator certification cannot be effectively implemented until these questions or problems are solved. Basic legal issues define areas where legal litigation on certification can focus, or where changes in statutory or administrative law are appropriate.

(These definitions and premises related to the certification of teachers and administrators are substantially with some modification from a PEA position paper on certification prepared in 1971)

SUMMARY STATEMENT OF THE BASIC ISSUES

In order that there will be some fairly clear idea, in advance, of the direction in which the discussion in this paper is leading, I would like initially to propose the following six questions which I believe pose critical, not necessarily mutually exclusive, basic legal problems on the question of teacher certification:

SIX BASIC LEGAL QUESTIONS ON CERTIFICATION

- 1- Through teacher certification does the State, or its delegate agencies, certify that a person is in fact qualified a) by experience and/or b) by academic preparation, to teach and/or administer effectively a publicly accredited school program in the State?
- 2- The State certifies to itself and/or to its local delegate agencies that a person is qualified, and subsequently this individual demonstrates on the job that he or she is not capable of effectively performing the teaching duties for which certification was granted; does the State or its appropriate delegate agencies become legally liable?
A) To taxpayers? B) To parents and students?
- 3- Does a State certified teacher or administrator have a legal cause for action against the State or its delegate agencies, should performance on the job demonstrate lack of the real qualifications which the State previously certified the person to possess?
- 4- Does a taxpayer in the State have a legal cause of action against the State should it be proved that unvalidated inadequate teacher certification policies of the State occasion a substantial waste of public monies appropriated for support of public education?
- 5- Are the State and its delegate agencies legally obligated to validate regularly their certification policies and procedures by proving them to be job related, through analysis and evaluation of certification standards in terms of their relation to effective learning by students?
- 6- Is the State obligated to demonstrate that its certification policies and procedures do not discriminate arbitrarily against members of racial minorities aspiring to be teachers and administrators in publicly accredited schools of the State?

CERTIFICATION TO PROTECT THE PUBLIC INTEREST

The function of law is to protect the public interest. Where there is no governmentally recognized and politically organized public with a special interest in need of protection and support, there is no need nor possibility of law understood in any formal sense. The notion of a "private law" is self contradictory. Any law which pretends either in theory or practise primarily to protect and promote the rights of a substantially private person or organization falls into the category of special interest legislation and constitutes an abuse of legislative power. Laws which primarily benefit private parties do exist, but such laws are not a legitimate, moral, and rational use of political power.

The basic argument of this paper is that the right and responsibility of the State to certify teachers is a legitimate, moral, and rational use of the political power of the State, only to the extent that teacher certification protects and promotes some demonstrably legitimate public interest of the people for whose welfare and benefit State accredited schools are established. Statutes, policies, and procedures which together constitute teacher certification are not authorized in order to protect special private interests, such as the desires of aspiring teachers for some official State acceptance of previous training and experience. Just as the State does not examine and license physicians in order to assist the graduate of a medical school in pursuing his special private interest of setting up a practise and making money, so the proper purpose of State procedures for teacher certification is not to assist the graduate of a school of education in pursuing his legitimate private goal of getting a job and enjoying a greater degree of job security.

If this statement about the overriding importance in the eyes of the law of the public interest or welfare seems initially obvious and possibly simplistic, I apologize. But hopefully the subsequent discussion of teacher certification and the law will point up the special significance of understanding clearly in whose interest the certification of teachers ought to be carried out.

Identification of all the legal issues related to the State's function of certifying teachers and other educational personnel would be a never-ending task. Any time a parent complains about the treatment of his child by a classroom teacher or administrator, a legal issue related to the State's certification of that teacher or administrator can arise. Similarly any time a taxpayer complains about the waste of his tax money in the support of schools alleged to be poorly staffed with certificated personnel, a legal question again arises regarding the de facto legitimacy of the State's policies and program for teacher certification. Or any time an aspiring teacher or school supervisor complains that governmental policies for examining and certificating educators are arbitrary or discriminatory, again a legal issue regarding the certification of teachers arises.

A primary purpose of this presentation shall be not to discuss the vast variety of legal issues that teacher certification occasions. Rather the primary purpose here will be to sort out and discuss certain basic legal issues related to teacher certification fundamental in understanding and solving educational problems rooted in the State's right and responsibility to certificate teachers and school administrators.

In order that the discussion will be as concrete as possible and related to the needs and experience of those present, I propose to limit my remarks substantially to educational laws and legal issues on teacher certification as found in New York State and in New York City. I would suggest that such an approach is not parochial and provincial, but that the New York experience directly relates to and at least in general reflects the contemporary national experience of reassessing the legitimacy of both operating and proposed programs aimed at evaluating and reforming governmental programs for certification of teachers and school administrators.

CERTIFICATION IN N. Y. STATE

"We have concluded that better performance in the schools can be obtained with no increase (and possibly with a reduction) in cost by changing the recruitment and training, salary structure, certification procedures, job assignment and working conditions of school personnel." (Report of the Fleischmann Commission, Vol.3, Chapter 13, "Introduction")

The New York State Constitution, like every state constitution requires as a matter of compulsory law that the people of the State establish and maintain a system of elementary and secondary public schools, charged with the responsibility of making a publicly supported and publicly controlled program of effective education available to its residents. In New York State the primary responsibility for assuring the faithful discharge of this State constitutional mandate rests with the State Board of Regents. The Regents are a policy making educational agency of the State which both has the authority to initiate administrative law determining how localities throughout the State are to provide publicly accredited schools for the people, and also has the responsibility of overseeing the execution of particular educational laws enacted by the State legislature and accepted by the Governor.

Operating under the New York State Board of Regents is the State Commissioner of Education and the State Department of Education, establishing educational policies and laws that set statewide minimum standards for local educational policies and laws. Policies and laws established by the State Commissioner and Department of Education are legal rules governing the way in which publicly accepted schools are to operate. Individual public schools operating throughout the State normally are organized into schools districts, each of which is governed by a local school board, subject to minimum standards of quality promulgated by the State Board of Regents and the State Educational Department. Each local school board also makes policy and establishes administrative laws governing the operation of its own schools, including policy governing the selection and evaluation of teachers and administrators.

Within this constitutional, legislative, and organizational context the State of New York attempts to regulate through the process of teacher certification the quality of the personnel who are permitted to teach and administer in the publicly accredited schools of the State.

The Fleischmann Commission has observed, "Common sense, now reinforced by evidence from research, has convinced us that the most significant contribution toward student learning is made by teachers and other educational professionals." (See "Introduction," Chapter 13, Educators and Educational Policy). The quality of education that takes place in the schools is clearly related directly to the quality of the personnel who teach in the schools of the State. Each of the cooperating private or public agencies responsible for establishing and operating the publicly accredited schools of the State is legally obligated by the State constitution to assure that personnel teaching in accredited schools should have the highest possible competence in training and experience that will in turn assure, as far as possible, a minimum standard of quality instruction for students. Through a regularized system of examining and evaluating the quality of teachers' training and experience the State Board of Regents, the State Commissioner of Education, and each local school board is authorized to "certify" that properly examined professional personnel are competent to instruct or administer instructional programs in the State's accredited schools.

Unlike any other school district in N. Y. State the City of New York has by State statute its own special public agency for the certification of educational personnel employed either by the central board of education or by any one of the City's thirty-two community school boards. This agency, the New York City Board of Examiners, is obligated to assure that educational personnel working in the City's public schools meet at least the minimum state requirements for certification, in addition to whatever further special criteria the Chancellor, the City Board, and the Community School Boards may specify as important for the special needs of the City's public schools. (See special PEA Memorandum on the NYC Board of Examiners and its dysfunctional operations, September 1973).

CERTIFICATION TO PROTECT STUDENTS

Let us assume that from an educator's point of view the primary goals of every publicly authorized teacher certification program are, a) to protect students from incompetent persons purporting to be educators, but in fact not capable of teaching students, and, b) to provide a system for enhancing opportunities for improved student learning by "guaranteeing" minimum basic standards of ability to teach among people certificated by the State for the role of teacher or administrator. Certainly the moral legitimacy of these two basic goals for any governmental program of teacher certification is clear. However, it is not so clear that N. Y. State educational law generally accepts these two basic assumptions. In N. Y. State the educational law does require the State Commissioner of Education to establish and maintain a statewide system of teacher certification, and that part of the State Constitution relating to the employment of civil service employees, requires that public employers are to hire the best qualified employees, determined where possible by competitive examination of the qualifications of individual job applicants.

The statutory law that governs State teacher certification procedures is meagre. A minimum age for teacher certification is set (18 years of age); a citizenship requirement is established regarding the need for a certificated teacher to have a decent moral character; and certification of professional competence must have been granted by the State Commissioner of Education.

N. Y. State law requires the Commissioner of Education to determine whether an applicant for a teaching or administrative position is competent or not. But the law leaves substantially to the discretionary judgment of the State Board of Regents and the State Commissioner of Education the practical determination of what should or should not count for evidence of competence. In part, as a consequence of the wide discretion allowed the State Commissioner in certifying teachers and administrators, a vast array of generally unvalidated statewide administrative regulations have developed, having the force of administrative law purporting to separate the "qualified" from the "unqualified" among applicants for teaching and administrative positions.

N. Y. State constitutional, statutory, and administrative law does not state clearly nor effectively require that educational personnel certification policy and procedures, a) protect students from incompetent persons being licensed as educators, and, b) guarantee a system of personnel certification assuring enhanced opportunities for improved student learning.

Whatever the explanation for N. Y. State's previous failure to recognize and protect under State law the right of students to a system of teacher certification that gives students truly effective teachers, some glimmer of hope for reform seems to be shining at the end of the tunnel. The Regents and the State Commissioner have committed themselves to establishing new performance-based

regulatory law to control policy and procedures for the certification of teachers. Whereas previous certification procedures stressed academic preparation and some prior experience in the classroom as prima facie evidence in favor of certification, the new approach is supposed to emphasize the teacher applicant's demonstrated ability to teach as acceptable evidence favoring either probationary or "permanent" certification.

Under the proposed and developing new approach to teacher certification, the State is assuming a formal legal obligation to assure that the teacher applicants whom it certifies will in fact be able to teach so that students can learn. Consequently, should a Peter Doe Case (See Peter Doe v. San Francisco Unified School District, Superior Court of State of California, Nov. 20, 1972) subsequently arise in N.Y. State, a plaintiff would have a fairly clear legal standing in the courts to sue the State, should a student be given a teacher certified to teach, but who in fact is not competent to teach.

Present statutory law in N.Y. State has not yet recognized in any formal and meaningful sense a State obligation to certify as teachers and administrators only those individuals who are competent to perform the various tasks involved in effectively teaching students enrolled in the elementary and secondary schools of the State. However, legislation was introduced into the 1973-1974 session of the New York State legislature "to amend the education law, in relation to developing and implementing a system of competency-based teacher certification." (Assembly Bill 6842-A, Cal. No. 917). The bill was not passed by the legislature, but does reflect a newly developing sense among State legislators to make certification procedures related more realistically to real competencies of educators to promote student learning. Legislation with a similar emphasis on student learning was passed by the California State Legislature in 1971 (the so-called Stull bill), mandating the development and implementation of uniform policies and procedures for the evaluation on the job of all State certified educational personnel, a primary criterion for evaluation being "establishment of standards of expected student progress in each area of study and of techniques for assessment of that progress." (California State Board of Education Guidelines for School Districts to Use in Developing Procedures for Evaluating Certificated Personnel, California State Board of Education, 1972).

PROTECTING THE INTEREST OF PARENT AND TAXPAYER THROUGH TEACHER CERTIFICATION POLICIES

The establishment and operation of a system of publicly accredited elementary and secondary schools is recognized to be a constitutional obligation of the State of New York under the general health and welfare clause of the State constitution. Federal legislation to protect and support public schools is similarly rooted in the general welfare provisions of the Federal Constitution.

The Federal responsibility for supporting and promoting public elementary-secondary school systems normally reaches parents and taxpayers only indirectly, that is through State educational departments and through local school agencies (local school boards and individual local schools). State authorization or accreditation of a local elementary-secondary school agency or school relies heavily on a determination that a local school agency or school is staffed with an appropriate number of teachers and administrators certified by the State as qualified to teach or administer in a school or school district.

In New York State the Regents and the Department of Education purport to protect the educational rights of parents and taxpayers by refusing to authorize the employment of school teachers and administrators who have not first been examined and certificated as qualified by the Regents and the State Commissioner of Education. Parents and taxpayers have a legal right under the law to have accredited public schools staffed with qualified personnel. Given the increased complexity of modern educational systems and the wide ranging diversity of the student populations enrolled in the accredited schools of the State, the problem of setting up an effective system for examining and certifying the quality of those educational personnel who can best serve the needs of individual local school districts and individual local schools is increasingly formidable. Simple reliance on the adequacy of post secondary college and university programs designed to train teachers and administrators has proved not to be a satisfactory approach to examining and licensing teachers and administrators.

Taking only the City of New York as an example, it is increasingly clear that both the State system of teacher certification and the City system of certification administered through the New York Board of Examiners neither understand nor meet the right of parents and taxpayers to have an efficient, educationally realistic, job-related, and non-discriminatory system for determining who can best teach and administer accredited elementary-secondary school programs in New York City. There have been in the past and continue to be in the present a continuing flood of complaints from parents and taxpayers protesting that teacher certification procedures do not identify a pool of persons genuinely qualified to teach students enrolled in the City's various public educational programs.

From a strictly legal and constitutional point of view, it would seem that parents and taxpayers would be legally justified in the City of New York, in suing the State Department of Education and its accredited local educational agencies (a) for certifying, as qualified to teach, thousands of individual teachers and administrators whose subsequent performance clearly does not meet the right of parents to have accredited school programs staffed with qualified personnel; and (b) for failing to establish, maintain, and continually validate a system of teacher certification that will insure a constantly available pool of teachers and administrators qualified to meet the parents' and taxpayers' right for schools staffed with personnel whose competence is guaranteed not only by reason of completion of an accredited program of teacher preparation but whose competence is also guaranteed by a continual program of on-the-job performance evaluation.

PARENT ROLE IN TEACHER CERTIFICATION

State law in New York does not provide a specific role for parents and educationally oriented groups to play in the certification of educational personnel. Established State laws and administrative procedures recognize only school boards and their professional staffs, along with university and college affiliated professional educators as being the appropriate persons or agencies competent to design and implement State approved teacher certification programs. State law, however, leaves room for involvement of parents and community in teacher certification, a) by not formally excluding parent and community involvement, and, b) by giving the Regents and the State Commissioner broad discretionary authority to define by administrative regulation policy and procedures for teacher certification. Until now the State has not chosen to involve parents and community systematically in the design and implementation of any existing or proposed teacher certification program.

However, local school boards do enjoy legally established powers to certify educational personnel as peculiarly qualified to meet the special educational needs of local districts (See Ed. Law @ 3008). In such instances no local school board can set qualification standards lower than those established by the State. However, through the development of special educationally relevant selection criteria for school teachers and administrators, virtually every local school district in the State does go beyond minimum State certification requirements in deciding who is best qualified to work in local schools. In many cases these special local qualification standards for teachers and administrators are determined by some process that utilizes the experience and desires of parents and community, as well as the judgment of the school board and its professional staff.

In the City of New York, as a consequence of Central School Board policy (see N. Y. City Board of Education, policy document Parent Associations and the Schools, 1971, and N. Y. City Chancellor's Special Circular No. 30, 1972), each of the City's 32 community school boards, and the Central Board are obligated at least to consult parents in deciding on the selection and performance criteria appropriate for choosing school administrators during the time that a Federal Court Order prohibits the City Board of Examiners from regularly examining and licensing supervisors for the City schools. However, under terms of a settlement reached in June 1973, in the Chance-Mercado suit (See Chance & Mercado v. Board of Examiners et. alii, U. S. District Court, Southern District of N. Y., July 14, 1971, and subsequent proceedings) the City Board of Examiners is obligated to certify as qualified any acting supervisors assigned pursuant to the conditions set down in Special Circular 30, and whose subsequent performance on the job is found satisfactory in accordance with performance criteria jointly developed by the Board of Examiners and each assigning local school board.

Each local school board in the City is left with the discretionary power to decide how much or how little parents and community will be involved in deciding what performance criteria are appropriate for evaluating acting supervisors who want certification as N. Y. City administrators. In this way, at least temporarily, it has become legal in N. Y. City for parents and community to become officially involved in determining standards for certification of the City's educational personnel. What is legally permissible for N. Y. City by way of parent and community involvement in teacher certification seems at least equally permissible to State authorities, depending on their will to use the broad discretionary power available to them in determining teacher certification policies and procedures.

At the present time there appears to be no strict legal right for parents to be involved in the State's certification program. However, there also appears to be no formal legal obstacle to prevent the Regents and the State Commissioner from adopting a policy that would mandate parent and community involvement in certifying school teachers and administrators through the State.

PROTECTING THE RIGHTS OF TEACHERS AND ADMINISTRATORS
THROUGH STATE AND LOCALLY ADMINISTERED
CERTIFICATION POLICIES AND PROCEDURES

School teachers and administrators are civil service employees whose primary responsibility is to discharge a public function, to carry out a constitutionally, statutorily, and administratively authorized system of publicly accredited education in the local schools established throughout the State. A student who aspires to be a teacher and/or administrator in the accredited elementary-secondary schools of the State has a moral and a legal right to expect that both the teacher preparation program in which he enrolls and that the subsequent examination and certification program to which he submits himself should in fact qualify him to teach or administer public educational programs in a manner consistent with applicable Federal, State, and local law. Clearly it is not the primary responsibility of the student to determine for himself whether or not his preparation and certification meet the basic legal and moral requirements governing the qualification of elementary-secondary educational personnel. After the investment by the student in years of training and thousands of dollars for the purpose of being adequately prepared to teach, the student has a right to expect that the State and other public authorities have properly designed and validated the training and certification program that places him in the open job market competing with other similarly prepared student teachers and administrators.

However, the experience of thousands of trained and certificated teachers in New York State and more particularly in New York City demonstrates clearly that present training and certification programs for teachers authorized by the State simply do not equip and license many teachers so that they can effectively discharge the educational responsibilities which the law, the educational profession, parents, taxpayers, and students rightly expect. Responsibility for this failure of State authorized training and certification programs cannot and should not be laid on the shoulders of either student teachers or practising members of the profession.

In order to protect themselves against what often appear to be inadequate training and certification programs authorized by the State and other public authorities, trained and licensed teachers have not hesitated to organize themselves to protect their good faith investment of time and money against unfair licensing and employment policies of the State's various boards of education. The emergence during the last few years in the City and State of stronger and stronger teacher unions, teacher associations, and administrators' associations, and the collective bargaining agreements negotiated between Boards of Education and such unions and associations represent in part an effort on the part of teachers and administrators to protect themselves legally against arbitrary action by public authorities in the training and licensing of educators. The legal right of school teachers and administrators to organize and protect their status as trained and licensed educators, under whatever policies and rules public authorities have established, is not capricious and irresponsible action. School teachers and administrators, like any other public or private employees, have a public right to a reasonable amount of security in their jobs and in their status as legally examined and licensed teachers. Given the present confused state of public policies and procedures for training and licensing teachers, it becomes all the more imperative, from the point of view of the teacher or student teacher, that legal protections be built firmly around those individuals who have decided to devote their professional lives to the work of education.

A careful analysis of what has happened in New York City and State in this regard suggests that unions and associations of teachers and school administrators in the State have developed a formidable system for protecting teachers and administrators from arbitrary action by public authorities in training, licensing, hiring and dismissing educators. Elaborately developed due process policies negotiated in collective bargaining agreements, coupled with weak State authorized policies for training and certificating teachers have conspired to make it almost impossible to challenge successfully the certificated qualifications of most school teachers and administrators. As a consequence, virtually no certified school personnel are found to be so unqualified to teach or administer that dismissal from the job becomes legally possible. This situation exists even in the face of the fairly obvious continuing proliferation of clearly inadequate performance by thousands of educators appointed to teaching and administrative positions throughout the State, particularly in urban centers such as New York City and Buffalo.

CERTIFYING SCHOOL ADMINISTRATORS AS MANAGEMENT OR LABOR

The State of New York regularly certifies the competency of applicants desiring to hold positions as principals in the State's public schools. However, in July 1973 the State Public Employee Relation Board (PERB) ruled that for New York City, principals are not part of the management and policy making arm of boards of education, and therefore are legally empowered to bargain collectively for salaries, working conditions, and fringe benefits in exactly the same way that teacher unions and associations bargain collectively. If on appeal the courts uphold this ruling of PERB, then clearly the State is obligated to re-view the validity of the traditional standards used to certify the competency of an applicant seeking a license as school supervisor. If principals do not manage schools, but only carry out non-policy making caretaker responsibilities over the schools to which they are assigned, then certification standards and procedures should be adjusted to reflect this inferior non-managerial role that principals play in the City of New York.

If what has been assumed by many to be the major managerial responsibility of school principals is not upheld by the courts on appeal of the July 1973 PERB ruling, then at least for New York City certification standards for principalships should be lowered, and possibly some new and higher managerial position will have to be established to provide for the clear needs of local schools for educationally certified personnel who will not only "supervise" educational programs in local schools, but will also manage those programs, developing and implementing policies on the local school level that will effectively implement educational policy decisions being made by higher level educational authorities.

JOB-RELATEDNESS OF CERTIFICATION PROCEDURES

Do the Regents, the State Commissioner of Education, the State Department of Education, and local boards of education have any legal obligation to assure that policies and procedures for the certification of teachers and school administrators are job-related? Certification standards which are obviously capricious and arbitrary would not be legal, e.g. a determination that teachers and administrators must all have 20/20 vision, and not need eyeglasses to correct deficient vision. Less clear would be the legal right and obligation of a governmental educational agency to mandate that all certificated personnel not be publicly avowed atheists. Can the State legally affirm a policy that it will not certify anyone who is an avowed homosexual? Can the State legally affirm a policy that it will not certify educational personnel who do not have twenty-five undergraduate hours of college courses focusing on the performing arts and the humanities, and so deny certification to an applicant who has only twenty-three credit hours in such courses?

All such questions bear on the problem of deciding how job-related does the law require that certification standards be, before authorities can be charged with having acted illegally in establishing certification standards. (See record of litigation in the Chance-Mercado case for a discussion of job-relatedness and certification). We have already observed that constitutional and statutory law leaves broad discretionary authority to public agencies charged with the responsibility of certifying teachers and administrators. Normally in such circumstances the courts are reluctant to substitute their judgment for the discretionary judgment that legislatures have allowed to administrative agencies in determining administrative policies and procedures for carrying out statutorily authorized responsibilities. The courts normally presume that administrative agencies are acting lawfully when exercising statutorily authorized discretionary judgment. The burden of proving that an exercise of discretionary judgment is illegal falls on the plaintiff in any court challenge.

When, however, the use of discretionary judgment in determining employment standards is not only questionably job-related, but also has the further effect of violating some other constitutionally and/or statutorily protected right of a plaintiff, then the courts will act to correct the wrong, and will challenge allegations of job-relatedness used as a defense by a public or private employer. Two significant cases dealing with the problem of the job-relatedness of employment standards are the *Griggs v. Duke Power Co* case (See 401 U.S. 424, 1971), and the *Chance-Mercado v. Board of Examiners* case (See citation above). In each of these cases the plaintiffs argued that qualification standards established by employers were a) not job-related, and b) were racially discriminatory. The racially discriminatory effect of the certification and employment standards challenged in these two cases were alleged to have followed directly from certification and employment criteria that were unvalidated as necessary and related to the jobs in questions. In both cases the courts held that the certification and preemployment tests were discriminatory in effect by appearing to set up job qualification criteria not validated as necessary for effective job performance, yet which effectively prevented members of racial minority groups from qualifying for appointment to the jobs in question. (However, had the court in the *Griggs* case found that the job qualification criteria were necessary and job-related, even though racially discriminatory in effect, then the court indicated that it would not have found the qualification criteria illegal).

It is not clear at present, how a court would rule if a plaintiff parent or taxpayer should claim that substantial harm was being done to parents or children (or possibly to the taxpayer) because a defendant state educational agency was certifying educational personnel on the basis of job qualifications that had not been validated as job-related, but which, without being racially discriminatory, clearly violated a child's or parent's right to a system of schools which effectively educated enrolled students. The *Peter Doe v. San Francisco Unified School District* case (See citation above) is one effort to force clarification of the State's responsibilities in the area of establishing public schools which educate effectively students enrolled in a State accredited school staffed with State certified teachers and administrators. This case has not yet been decided.

RACIAL DISCRIMINATION AND CERTIFICATION PROCEDURES

If policies and procedures for the certification of teachers and school administrators are demonstrated to be racially discriminatory, are such policies and procedures illegal? The answer to such a question is not as obvious as some might hope. If the discrimination follows from reliance on a determination of job qualifications that are not validated as necessary for effective job performance, the current law asserts that such discriminatory policies and procedures are a violation of Title VII of the 1964 Federal Civil Rights Act and probably of the equal protection clause of the fourteenth amendment to the Federal Constitution and as such are illegal. (For a discussion of this matter see Herbert Bernhardt, *Griggs v. Duke Power Co.* - Texas Law Review, Vol. 50:400 - 1972.) However, should it be demonstrated that the discriminatory job qualifications have been validated as necessary for effective job performance, then such policies and procedures, even though racially discriminatory, are not illegal.

Racial and ethnic minorities have had great difficulty at times in meeting job qualifications spelled out in certification standards established for teachers and administrators. However, the critical question that any plaintiff must ask before challenging such discriminatory standards, is "Have such standards been validated as necessary and job-related for effective discharge of school teaching and administrative responsibilities?"

PROPOSALS TO REFORM TEACHER PREPARATION AND CERTIFICATION POLICIES IN NEW YORK STATE

The present weaknesses of policies and procedures for training and licensing teachers in New York have not gone unnoticed by the Regents, the Commissioner of Education, the Federal Courts, special educational commissions, members of the State legislature, and by a host of other public and private educational agencies and persons throughout the State. Unfortunately criticisms of certification policies and procedures, and efforts aimed at reforming the approach to training and certifying teachers by these various agencies are not coordinated, and are often dominated by competing political interests remotely related to the primary educational interest which the State educational agency and its local counterparts should be protecting. This paper has identified three primary and competing public interests which the State's educational system and teacher certification program should be protecting:

- (1) The interest or need of students to be taught by persons genuinely qualified to understand and cope with the complex educational needs of students in the various school jurisdictions of the State;
- (2) The interest or need of taxpayers to have a governmentally authorized, efficient, educationally validated system for guaranteeing that there shall be a constant pool of effective teachers and administrators available to staff the accredited schools of the State;
- (3) The public interest of licensed teachers and administrators (and students preparing themselves for licensed educational positions) in being protected from arbitrary and irresponsible changes in training and certification procedures that would undermine the job security of teachers and administrators, and thereby undermine the State's authorized system of accredited public (and private) schools.

This paper takes the position that these competing interests are interrelated, but are not of equal importance. Among the three basic legal issues or public interests that must be protected effectively by the State's policies and procedures on teacher certification, the interest of students and their special need for fully qualified teachers and administrators to staff schools accredited by the State must be given priority consideration. Both the long and short range welfare of the people of the State and of the nation depends on the State's determination and ability to guarantee that the school age youth of the State are given a full opportunity to receive an education under fully qualified (properly certified) school teachers and administrators. If the State and its delegate local educational agencies fail to meet their primary legal and moral responsibility towards students, then the economic, political, and general social welfare of the people of the State is seriously undermined. And to the extent that the present failure of the State and local boards of education to establish a sound system for certifying educational personnel continues, to that extent it will become increasingly difficult, if not impossible to halt the continuing deterioration of the overall conditions necessary to protect effectively the constitutionally guaranteed welfare of the people of the State.

The recently released Fleischman Commission Report on Quality, Cost, and Financing of Elementary and Secondary Education recommended broad reforms for New York State in the preparation and certification of teachers and administrators. (See Vol. 3, Chapter 13.31 and following.) The Commission recognizing the peculiarly critical role that training and certifying educational personnel plays in assuring quality schools in the State, endorses the need for significant changes in the current law and administrative policies for certifying teachers. The core recommendations stress a retreat from the present heavy emphasis on certification based on accumulation of educational courses and limited intern experience.

In its place the Commission recommends a certification procedure that would continue to stress the importance of sound comprehensive undergraduate academic college preparation, with a reduction in the number of so-called educational methods courses required, and then stresses an extensive carefully supervised internship teacher training program with a heavy on-the-job evaluation component. Alternatively the Commission provides limited endorsement for defining and establishing a sound "competency-based" system of teacher certification. However, the Commission prefers a system of certification where controlling criteria for licensing would depend more on evidence of pupil progress than upon teacher behavior.

Also issued in 1972 was a proposal for a new approach to teacher certification advanced by the Regents and the State Education Department (EDUCATION BEYOND HIGH SCHOOL: The Regents Tentative Statewide Plan for the Development of Post-Secondary Education, 1972). This plan asserts, "Opportunities to acquire permanent certification should be expanded. Expansion efforts will be aimed at the improvement of professional service, not merely on graduate study per se..." (See Education Beyond High School, etc. previously cited, pp. 65-66.)

A PROPOSAL FOR TWO-STEP TEACHER CERTIFICATION

At present N. Y. State and N. Y. City law provide for certification of teachers by submitting each eligible applicant to a single examination procedure. This examination evaluates the quality of an applicant's pre-licensing academic preparation and experience. Once this single step examination procedure has been successfully passed, the applicant is given a permanent license, which except under rare circumstances is never revoked.

The weakness of the present single step licensing procedure is its reliance on what an applicant has done in the past, with no provision being made for on-the-job evaluation of a licensed applicant's performance. In other words, should the State or a City licensing authority make a mistake in granting a license to an applicant not properly qualified by academic preparation and experience, no remedy is readily available to correct the mistake. This situation becomes particularly burdensome when we recognize that normally regularly licensed applicants for school positions must be preferred to all unlicensed personnel, even though licensed personnel have received licenses through poorly validated or unvalidated examinations and licensing procedures of the State and City. One of the most obvious abuses of the present single step teacher certification procedures is its vulnerability to manipulation to meet the desires of special interest groups, e. g. to exclude racial and ethnic minorities from certification as teachers and administrators.

Without major modifications in State statutory law, present teacher certification policies could be significantly changed through discretionary action by the Regents and the State Commissioner, in the direction of a two step or multiple tier certification policy. Such a reformed policy would continue to require a base of rationally justified academic preparation and intern experience prior to even probationary certification, but would also require an extensive program of on-the-job performance evaluation as a further pre-requisite to granting any "permanent" or regular certification. In this way regular certification of a teacher or administrator would be prohibited until such time as an applicant for certification had demonstrated satisfactorily on the job over a reasonable period of time that he or she had, in fact as well as in theory, possession of the qualifications necessary to assure the effective education of students enrolled in the States accredited schools.